U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE ISSUED: February 17, 1989

CASE NO. 87-INA-686

IN THE MATTER OF THE APPLICATION
FOR AN ALIEN EMPLOYMENT CERTIFI-
CATION UNDER THE IMMIGRATION AND
NATIONALITY ACT

TRI-P'S CORP., dba JACK-IN-THE-BOX
Employer

on behalf of

RUDY VALASQUEZ
Alien

Joseph L. Fedun, Esq.
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; Brenner, DeGregorio, Guill, Schoenfeld, and Tureck, Administrative Law Judges

NAHUM LITT
Chief Judge:

DECISION AND ORDER

This case arose from an application for labor certification submitted by the Employer on behalf of the Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14) (1976). The Certifying Officer of the U.S. Department of Labor denied the application, and the Employer requested administrative-judicial review pursuant to 20 C.F.R. §656.26 (1988).[1]

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United

[1] All regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

States who are able, willing, qualified and available and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must apply for labor certification pursuant to §656.21. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File (A1-A34), and any written arguments of the parties. See §656.27(c).

Statement of the Case

On June 12, 1986, the Employer filed an application for alien labor certification to enable the Alien to fill the position of manager for its fast-food restaurant. (A15). The listed job duties included: ensuring that quality, friendliness, cleanliness and service standards are met; maintaining cost control; completing business planning; participating in community relations activities; enforcing adherence of company policies and procedures; interviewing, hiring, training and evaluating employees; ordering and buying food and supplies; performing administrative duties; scheduling management and production shifts; conducting crew and store management meetings. (A15). The Employer required 3 years experience in the job offered, and stated that the applicant "must be familiar with Jack-In-The-Box operations." (A15).

Prior to recruitment, the State employment agency indicated that the requirement of familiarity with Jack-In-The-Box operations was restrictive. (A28). In a letter, dated July 31, 1986, the Employer argued that the requirement is an actual and normal requirement for the position, that the position is always recruited with the requirement, and that the duties of manager of the Jack-In-The-Box could not be performed without the requirement. (A26).

On March 13, 1987, the CO issued a Notice of Findings, (A11), stating that the position was not clearly open to any U.S. worker since it appears that the alien has an ownership interest in the franchise. The CO also stated that under §656.21(b)(2)(i) the Jack-In-The-Box experience requirement appears unduly restrictive and not a normal requirement for the occupation, and that there is no evidence to indicate that other fast-food restaurant experience is not qualifying. (A12). According to the CO, the Alien did not meet the requirements of 3 years experience as a fast-food manager and familiarity with Jack-In-The-Box operations when initially hired by the Employer. (A12). The Employer was required to either justify the restrictive requirement, or delete the requirement and readvertise. (A12).

On April 15, 1897, the Employer submitted rebuttal. (A7-A10). The Employer submitted a statement from the owner stating that the Alien has no ownership interest in the franchise. (A9). The Employer also stated that "familiarity with Jack-In-The-Box operations can be obtained at any level and does not have to be in a managerial position, or for a specified length of time."

(A9). According to the Employer, the familiarity requirement is normal for fast-food chains since each restaurant has its own operational policies and procedures, and fast-food restaurants normally hire persons who are familiar with their operations or promote from within the store. (A9). With regard to the alien's prior experience, the Employer stated that the majority of the greater Los Angeles Jack-In-The-Box restaurants are owned by Foodmaker, Inc., the Alien's prior employer. (A9). According to the Employer, The Alien gained fast-food managerial experience and familiarity with Jack-In-The-Box operations with a completely different and separate employer. (A9). The Employer concluded that the familiarity requirement was a normal requirement within fast-food chains, and that the Alien was qualified for the position prior to being hired by the Employer. (A7).

On May 29, 1987, the CO issued a Final Determination denying certification. (A5). The CO found that the Employer had not convincingly shown that the Jack-In-The-Box experience requirement arises from business necessity. (A6). The CO also found that both Foodmaker's Inc., and the Employer have but one business activity, "the running of Jack-In-The-Box restaurants;" therefore, the Alien was hired by the Employer without prior experience with Jack-In-The-Box. (A6).

On June 30, 1987, the Employer requested administrative-judicial review. (A1). On appeal, the Employer argued, inter alia, that "[f]amiliarity with Jack-In-The-Box operations is important in that there are vast differences between the various fast food restaurants with respect to procedures for food preparation, time-keeping, ordering, reporting to the head office, and training." (Employer's Brief on Appeal, p. 5). The Employer concluded that familiarity with Jack-In-The-Box operations was a legitimate requirement of its business.

The CO, on appeal, argues that the Employer has failed to document that familiarity with Jack-In-The-Box operations arises from business necessity or is otherwise normally required for its available job in the United States.

Discussion and Conclusion

The CO denied the application for alien labor certification on the ground that the Employer has described the job opportunity with unduly restrictive requirements in violation of §656.21(b)(2). According to the CO, the Employer has failed to convincingly show that prior familiarity with Jack-In-The-Box operations arises from business necessity. Under §656.21(b)(2)(i), a job opportunity's requirements, unless adequately documented as arising from business necessity: shall be those normally required for the job in the United States; shall be those defined for the job in the Dictionary of Occupational Titles (D.O.T.).

The Employer argues that prior familiarity with Jack-In-The-Box operations is not unduly restrictive because the requirement is normally required for the job. The Employer has merely stated that prior familiarity with operations is a normal requirement for managers of fast-food restaurants. As stated in, In the Matter of Gencorp, 87 INA 659 (Jan. 13, 1988), "where an employer is required to prove the existence of an employment practice. . . , written assertions which are reasonably specific and indicate their sources or bases shall be considered

documentation." Id. In the instant case, the Employer's statement that prior familiarity with operations is a normal requirement for managers of fast-food restaurants is not specific and does not indicate its sources or bases. As such, it does not constitute documentation to support the Employer's argument that familiarity with Jack-In-The-Box operations is normally required for the job in the United States. Accordingly, the Employer must demonstrate that prior familiarity with Jack-In-The-Box operations arises from business necessity.

To establish business necessity under §656.21(b)(2)(i), "an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described the employer." Information Industries, Inc., 88 INA 82 (Feb. 9, 1989)(en banc). In the instant case, the Employer must establish that prior familiarity with Jack-In-The-Box operations bears a reasonable relationship to the occupation of manager of a Jack-In-The-Box restaurant, and is essential to perform, in a reasonable manner, the job duties described by the Employer, (ensuring quality, completing business planning, etc.).

The Employer has stated that each fast-food restaurant chain has its own operational policies and procedures. The Employer has argued that prior familiarity with Jack-In-The-Box operations is a legitimate requirement of its business. Prior familiarity with Jack-In-The-Box operations bears a reasonable relationship to the occupation of manager of a fast-food restaurant in the context of the Employer business of operating a Jack-In-The-Box restaurant, since each fast-food chain has it own operational policies and procedures.

The Employer has argued that there are vast differences between the various fast-food restaurants with respect to operational procedures, and that the duties of manager of Jack-In-The-Box could not be performed without familiarity with Jack-In-The-Box operations. However, the Employer also stated that familiarity with Jack-In-The-Box operations can be obtained at any level and for any length of time. The Employer has not explained nor has it documented why Jack-In-The-Box operations are so different that an applicant who has general fast-food managerial experience cannot perform the duties of Jack-In-The-Box manager after a reasonable amount of training.

The Employer has not established that prior familiarity with Jack-In-The-Box operations is essential to perform the job duties of manager of its Jack-In-The-Box restaurant. Since the Employer has not shown that the requirement is normally required for the job in the United States and has not shown that the requirement arises from business necessity, the CO properly concluded that the requirement is unduly restrictive under §656.21(b)(2).

ORDER

The Final Determination of the Certifying Officer denying labor certification is hereby AFFIRMED.

NAHUM LITT
Chief Administrative Law Judge

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